

Fred Norton (SBN 224725)
Bree Hann (SBN 215695)
Matt Turetzky (SBN 280997)
Tyler M. Layton (SBN 288303)
THE NORTON LAW FIRM PC
299 Third Street, Suite 106
Oakland, California 94607
Telephone: (510) 906-4900
Fax: (510) 906-4910
fnorton@nortonlaw.com
bhann@nortonlaw.com
mturetzky@nortonlaw.com
tlayton@nortonlaw.com

*Attorneys for Defendants AREND
NOLLEN, LEON HEDGES, DAVID
PASANEN, and SOCIAL MEDIA
SERIES LIMITED*

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

FACEBOOK, INC., a Delaware corporation,
and INSTAGRAM, LLC, a Delaware limited
liability company,

Plaintiffs,
v.

ARENDE NOLLEN, LEON HEDGES, DAVID PASANEN, and SOCIAL MEDIA SERIES LIMITED,

Defendants.

Case No.: 3:19-cv-02262

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO DISMISS FOR LACK
OF PERSONAL JURISDICTION AND
FORUM NON CONVENIENS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

[Declarations of Arend Nollen, Leon Hedges, David Pasanen, David Gerard Dewar, and Fred Norton, Supporting Exhibits, and (Proposed) Order concurrently filed]

Date: July 10, 2019
Time: 2:00 p.m.
Location: Courtroom 2

Complaint Filed: April 25, 2019

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on July 10, 2019 at 2:00 p.m., or as soon thereafter as
 3 counsel may be heard in Courtroom 2 of the above entitled Court, located at 450 Golden Gate
 4 Avenue, San Francisco, CA 94102, Defendants Arend Nollen, Leon Hedges, David Pasanen, and
 5 Social Media Series Limited (“SMS”) (collectively “Defendants”) will move this Court to
 6 dismiss Plaintiffs Facebook, Inc. (“Facebook”) and Instagram, LLC’s (“Instagram”) (collectively
 7 “Plaintiffs”) Complaint pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal
 8 jurisdiction, and, in the alternative, to dismiss Plaintiffs’ Complaint based on the common law
 9 doctrine of *forum non conveniens*.

10 This Motion to Dismiss will be made on the grounds that this forum cannot exercise
 11 personal jurisdiction over Defendants, which are New Zealand citizens and a New Zealand
 12 limited liability company, and which do not have the requisite minimum contacts with the State
 13 of California, that New Zealand is an adequate and proper alternate forum to litigate the parties’
 14 dispute, and that private and public interests weigh in favor of dismissal.

15 This Motion to Dismiss is based upon this Notice, the attached Memorandum of Points
 16 and Authorities, the Complaint and its attachments, the separately filed Declarations of Arend
 17 Nollen, Leon Hedges, David Pasanen, David Gerard Dewar and Fred Norton, and all records,
 18 pleadings, and argument as may be presented at or before the hearing on this Motion.

19 Dated: June 12, 2019

THE NORTON LAW FIRM PC

21 By: /s/ Fred Norton

22 Fred Norton
 Attorneys for Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Social Media Series Limited (“SMS”) is a New Zealand-based marketing company that is operated by three New Zealand citizens and residents – defendants Leon Hedges, David Pasanen, and Arend Nollen (the “Individually Named Defendants”) (together with SMS, “Defendants”), and which formerly operated the website LikeSocial.co. SMS is headquartered in Upper Hutt, New Zealand, and the Individually Named Defendants live in Upper Hutt (Messrs. Hedges and Nollen) and Lower Hutt (Mr. Pasanen), New Zealand. Defendants have absolutely no connections to California or the United States; the Individuals live and work exclusively in New Zealand, and SMS, which is organized under the laws of New Zealand, has no business operations in, or ties to, the U.S.

Neither SMS, nor LikeSocial.co, nor Mr. Hedges, nor Mr. Pasanen have ever had an Instagram account or agreed to Instagram's Terms of Use ("TOU" or "Terms"). Mr. Nollen has only had a personal (and now closed) Instagram account – one that he used exclusively as a consumer and never in connection with SMS's business. Nonetheless, Plaintiffs Instagram, LLC ("Instagram") and Facebook, Inc. ("Facebook") have sued Defendants in the Northern District of California, claiming (incorrectly) that Defendants agreed to the Instagram TOU and the jurisdiction clause contained therein.

This is simply false. Three of the four defendants never agreed to the TOU, and the fourth has only agreed only in connection with a personal account that has nothing to do with the alleged commercial misconduct described in the Complaint. However, even if Plaintiffs had agreed to the TOU, that agreement – which Plaintiffs neglected to file with the Complaint – does not require jurisdiction in California, but actually requires jurisdiction in New Zealand.

While Plaintiffs – two of the largest and most profitable social networking platforms in the world – may prefer to litigate this case in California and force Defendants to defend a lawsuit thousands of miles from their homes, it would be improper to subject Defendants to personal jurisdiction in this Court. Defendants have no contacts with California, much less intentional,

1 continuous, and systematic contacts that could give rise to personal jurisdiction. Defendants did
 2 not purposefully direct their conduct at California, nor purposefully avail themselves of the
 3 benefits of doing business in the state. None of the alleged misconduct took place in California,
 4 and all potential witnesses and evidence are in New Zealand. Dismissal of this case for lack of
 5 personal jurisdiction is proper.

6 Alternatively, the Complaint should be dismissed based on the doctrine of *forum non*
 7 *conveniens*. The same factors demonstrating that there is no personal jurisdiction over
 8 Defendants also establish that this Court is not the proper venue for this action. New Zealand
 9 provides an adequate alternative venue, and all of the private and public interest factors relevant
 10 to a *forum non conveniens* analysis weigh in favor of dismissal.

11 For these reasons, and as set forth more fully below, Defendants request that the Court
 12 dismiss Plaintiffs' Complaint with prejudice.

13 **II. SUMMARY OF RELEVANT FACTS**

14 **A. Individually Named Defendants**

15 Arend Nollen is a New Zealand citizen who resides in Upper Hutt, New Zealand. Nollen
 16 Decl. ¶ 2. Mr. Nollen conducts no business in the United States and has no business interests or
 17 assets in the U.S. *Id.* ¶¶ 4-5. He has never earned income in the U.S. or paid U.S. taxes. *Id.* ¶ 6.
 18 He has never traveled to the U.S. and has no family or friends in the U.S. *Id.* ¶ 3.

19 Leon Hedges is a New Zealand citizen who resides in Upper Hutt, New Zealand. Hedges
 20 Decl. ¶ 2. Mr. Hedges conducts no business in the United States and has no business interests or
 21 assets in the U.S. *Id.* ¶¶ 4-5. He has never earned income in the U.S. or paid U.S. taxes. *Id.* ¶ 6.
 22 Mr. Hedges has no family or friends in the U.S. and has visited the U.S. three times on vacation.
Id. ¶ 3.

23 David Pasanen is a New Zealand citizen who resides in Lower Hutt, New Zealand.
 24 Pasanen Decl. ¶ 3. Mr. Pasanen conducts no business in California or the United States and has
 25 no business interests or assets in California or the U.S. *Id.* ¶¶ 5-6. He has never earned income
 26 in California or the U.S. or paid state or federal taxes. *Id.* ¶ 7. Mr. Pasanen has no family or
 27 friends in the U.S., and he has visited the U.S. twice on vacation. *Id.* ¶ 4.

1 **B. Social Media Series Limited**

2 On or around January 8, 2016, Messrs. Nollen, Hedges, and Pasanen registered Social
 3 Media Series Limited as a New Zealand limited liability company. Pasanen Decl. ¶¶ 9, 11. SMS
 4 is a marketing agency headquartered in Upper Hutt, New Zealand, with Messrs. Nollen, Hedges,
 5 and Pasanen as its sole directors and shareholders. Pasanen Decl. ¶¶ 9-11. Individually, Mr.
 6 Nollen serves as SMS's marketing lead (Nollen Decl. ¶ 1), Mr. Hedges oversees web
 7 development (Hedges Decl. ¶ 1) and Mr. Pasanen runs SMS customer service (Pasanen Decl. ¶
 8 1).

9 SMS is not incorporated in California, nor has it qualified to do business in California.
 10 Pasanen Decl. ¶ 12. SMS has no subsidiaries incorporated or qualified to do business in
 11 California. *Id.* ¶ 13. None of SMS's officers or directors reside or are domiciled in California.
 12 *Id.* ¶ 14. SMS has no employees residing or domiciled in California. *Id.* ¶ 15. SMS has no
 13 branch office or comparable facilities in California, and it has no telephone listing or mailing
 14 address in California. *Id.* ¶ 16. SMS has no bank accounts or other tangible personal or real
 15 property in California. *Id.* ¶ 17. SMS does not direct any advertising specifically toward
 16 California residents, nor does it advertise in any publications that are directed primarily toward
 17 California residents; rather, SMS offers its services to anyone in the world through publicly
 18 accessible websites. *Id.* ¶ 18. SMS's officers, directors and shareholders have never convened
 19 in California, and none of its officers, directors or shareholders attend business conferences or
 20 similar functions within the state. *Id.* ¶ 20. While SMS utilizes third-party vendors from around
 21 the world in connection with its business, none of its vendors are located in California or the U.S.
 22 *Id.* ¶ 21.

23 **C. Non-Party Entities**

24 LikeSocial.co

25 SMS formerly operated the website LikeSocial.co, which connected Instagram users
 26 seeking to increase their visibility on the Instagram platform with third-party vendors that could
 27 generate "likes" and "followers" for the user, thereby increasing the user's visibility on the
 28

1 Instagram platform and enhancing the user's experience. Pasanen Decl. ¶ 23. Neither SMS nor
 2 LikeSocial.co had direct access to any Instagram users' accounts; all "likes" and "followers" that
 3 the user received in connection with their LikeSocial.co subscription were generated by third-
 4 party vendors. *Id.* ¶ 24. No third-party vendors with whom SMS worked in connection with the
 5 LikeSocial.co business were located in California or the U.S. *Id.* ¶ 21. LikeSocial.co voluntarily
 6 suspended operations in April 2019. *Id.* ¶ 26

7 Social Envy Limited

8 Prior to forming SMS, Messrs. Nollen and Hedges formed Social Envy Limited ("SEL"),
 9 a New Zealand LLC headquartered in Upper Hutt, New Zealand. Messrs. Nollen and Hedges are
 10 the sole shareholders and directors of SEL, which is not a party to this lawsuit. Hedges Decl. ¶
 11 8. SEL is not incorporated in California, nor is it qualified to do business in California. *Id.* ¶ 10.
 12 SEL has no subsidiaries incorporated or qualified to do business in California. *Id.* ¶ 11. None of
 13 SEL's officers, directors or employees reside or are domiciled in California. *Id.* ¶ 12. SEL has
 14 no branch office or comparable facilities in California, and it has no telephone listing or mailing
 15 address in California. *Id.* ¶ 13. SEL has no bank accounts or other tangible personal or real
 16 property in California. *Id.* ¶ 14. SEL does not direct any advertising specifically toward
 17 California residents, nor does it advertise in any publications that are directed primarily toward
 18 California residents; rather, SEL offered its services to anyone in the world through publicly
 19 accessible websites. *Id.* ¶ 15. SEL's officers, directors and shareholders have not convened in
 20 California, and none of its officers, directors or shareholders attend business conferences or
 21 similar functions within the state. *Id.* ¶ 17. On occasion, non-party SEL has contracted with a
 22 U.S.-based vendor to conduct email campaigns related to SEL's business. Defendant SMS has
 23 never engaged this vendor in any capacity. *Id.* ¶ 18.

24 SocialEnvy.co

25 Between January 2015 and February 2018, non-party SEL operated the website
 26 SocialEnvy.co, which connected Instagram users with third-party vendors that would increase
 27 the user's activity on the platform, thereby increasing the user's visibility. Hedges Decl. ¶ 20.
 28 SocialEnvy.co did not involve an Instagram user increasing their numbers of "likes" or

1 “followers.” *Id.* Neither non-party SEL nor SocialEnvy.co had direct access to any Instagram
 2 users’ accounts; all account-related activities were conducted by third-party vendors located
 3 outside of the U.S. *Id.* ¶ 21. Non-party SEL voluntarily discontinued SocialEnvy.co in February
 4 2018, following a cease and desist letter from Facebook and Instagram. *Id.* ¶ 25.

5 *IGFamous.net*

6 *IGFamous.net* was created in January 2016 and owned by SMS. Pasanen Decl. ¶ 27.
 7 *IGFamous.net* voluntarily ceased operations in or around February 2018, following a cease and
 8 desist letter from Facebook and Instagram. *Id.* ¶ 28. Believing that Facebook and Instagram
 9 were alleging a trademark violation related to the letters “IG,” *IGFamous.net* was rebranded to
 10 *LikeSocial.co* to attempt to comply with the cease and desist letter. *Id.*

11 **D. Defendants’ Use of Instagram**

12 Messrs. Hedges and Pasanen have never had Instagram accounts. Hedges Decl. ¶ 7;
 13 Pasanen Decl. ¶ 8. Of the Individually Named Defendants, only Mr. Nollen has ever maintained
 14 a personal Instagram account, which he opened in or around 2014 and closed in or around 2018.
 15 Nollen Decl. ¶ 7. That Instagram account was strictly for personal use (e.g., posting personal
 16 pictures for family and friends) and was in no way affiliated with the SMS or SEL businesses.
 17 *Id.* SMS does not maintain an Instagram or Facebook account and does not advertise on
 18 Instagram or Facebook. Pasanen Decl. ¶ 22.

19 **E. Non-Party Entities’ Use of Instagram**

20 *LikeSocial.co*

21 *LikeSocial.co* did not maintain an Instagram or Facebook account and did not advertise
 22 on Instagram or Facebook. Pasanen Decl. ¶ 25.

23 *Social Envy Limited*

24 Non-party SEL does not maintain an Instagram or Facebook account and does not
 25 advertise on Instagram or Facebook. Hedges Decl. ¶ 19.

26 *IGFamous.net*

27 *IGFamous.net* did not maintain an Instagram account. Pasanen Decl. ¶ 29.

1 IGFamous.net did maintain a Facebook account from about 2016 to 2018, and also ran limited
 2 advertising on Facebook in or around August 2016. *Id.*

3 *SocialEnvy.co*

4 SocialEnvy.co, which was owned and operated by non-party SEL, maintained an
 5 Instagram account, which was created in or around January 2015 and closed in or around
 6 February 2018. Hedges Decl. ¶ 22. The SocialEnvy.co Instagram account existed solely to
 7 increase the company's exposure; the business of SocialEnvy.co (i.e., connecting users with
 8 third-party vendors) was never carried out using the SocialEnvy.co Instagram account. *Id.* ¶ 23.

9 SocialEnvy.co maintained a Facebook account (created in or around January 2015 and
 10 closed in or around February 2018) and also advertised on Facebook. Hedges Decl. ¶ 24. These
 11 advertisements ran on Facebook from approximately October 2016 to February 2018. *Id.*

12 F. **Plaintiffs Facebook and Instagram**

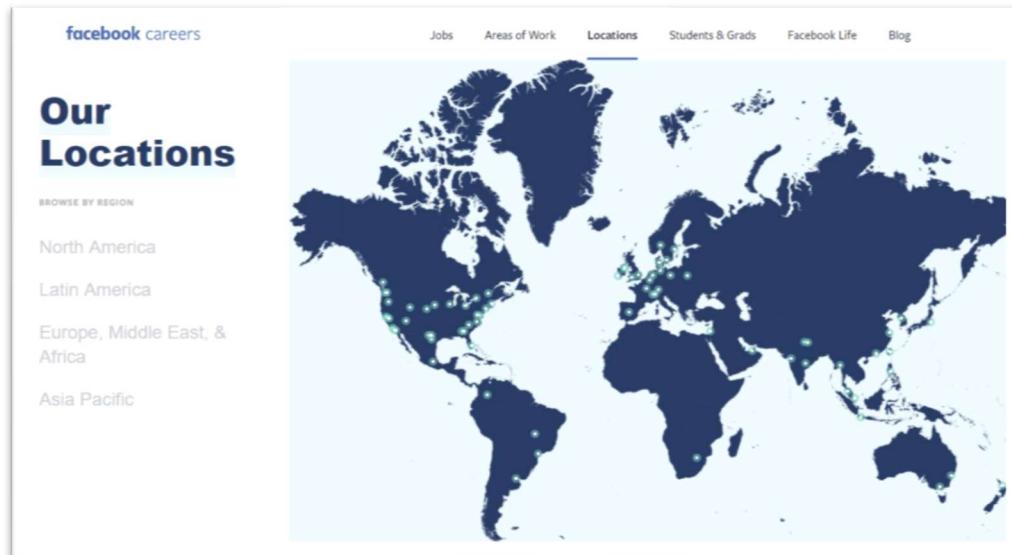
13 Facebook and Instagram are two of the largest social networking platforms in the world,
 14 with an estimated 3.32 billion combined monthly active users.¹ Facebook, a Delaware
 15 corporation, is headquartered at 1 Hacker Way, in Menlo Park, CA, and maintains a physical
 16 presence around the globe² – including an office in Auckland, New Zealand³:

24 ¹ See “Most Popular Social Networks Worldwide as of April 2019, Ranked by Number of Active
 25 Users (In Millions)” (found at: [https://www.statista.com/statistics/272014/global-social-](https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/)
 networks-ranked-by-number-of-users/) (accessed June 7, 2019).

26 ² See “Facebook Careers – Our Locations” (found at:
<https://www.facebook.com/careers/locations>) (accessed June 7, 2019).

27 ³ See “Facebook Careers – Auckland, New Zealand” (found at:
[https://www.facebook.com/careers/locations/auckland/?locations%5B0%5D=Auckland%2C+Ne](https://www.facebook.com/careers/locations/auckland/?locations%5B0%5D=Auckland%2C+New+Zealand)
 w+Zealand) (accessed June 7, 2019).

28 (Footnote Continued on Next Page.)



Instagram, a Facebook subsidiary and self-described “global community of more than 1 billion,”⁴ is a Delaware corporation headquartered in Menlo Park, California. Instagram has offices in San Francisco, New York, and London, and soon will have an office in Tokyo.⁵

G. Instagram’s Terms of Use

While only one Defendant has ever had an Instagram account (Mr. Nollen’s personal, non-commercial account, discussed above), Plaintiffs assert that Instagram’s TOU, and the jurisdiction clause contained therein, establish personal jurisdiction over all Defendants. Compl. ¶ 13. Because Plaintiffs neglected to include the purportedly critical TOU with the 22 exhibits accompanying their Complaint, Defendants attach a true and correct copy of Instagram’s New Zealand⁶ TOU as Exhibit A to the Declaration of David Dewar, filed concurrently with this Motion.

The jurisdiction clause in Instagram’s TOU reads as follows:

///

⁴ See “Jobs at Instagram – Country Marketing Manager, Japan (found at: <https://www.instagram.com/about/jobs/req/a1K2K000007BqUaUAK/>) (accessed June 7, 2019).

⁵ See The Japan Times: “Instagram’s First Overseas Development Team to Set up Shop in Tokyo” (found at: <https://www.japantimes.co.jp/news/2019/03/15/business/corporate-business/instagrams-first-overseas-development-team-headed-tokyo/#.XPsOYIxKiUk>) (accessed June 7, 2019).

⁶ References to Instagram’s “TOU” or “Terms” in this Motion will refer to the New Zealand TOU, attached to the Dewar Declaration as **Exhibit A**.

How We Will Handle Disputes

If you are a consumer, the laws of the country in which you reside will apply to any claim, cause of action, or dispute you have against us that arises out of or relates to these Terms (“claim”), and you may resolve your claim in any competent court in that country that has jurisdiction over the claim. In all other cases, you agree that the claim must be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, that you submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim, and that the laws of the State of California will govern these Terms and any claim, without regard to conflict of law provisions.

Dewar Decl., Exh. A, p.5.

This language differs from Instagram's U.S.⁷ Terms, which contain the following jurisdiction clause, quoted in relevant part:

How We Will Handle Disputes

For any claim that is not arbitrated or resolved in small claims court, you agree that it will be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County. You also agree to submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim.

Norton Decl., Exh. A, p. 5-6.

Notably, the New Zealand Terms differ from the U.S. TOU in their dispensation for “consumers.” The New Zealand Ministry of Business defines “consumer” as “anyone who buys products or services that are ordinarily for personal or household use. The ordinary use may change over time, eg computers are now commonly used for personal use.”⁸

III. LEGAL STANDARDS

A. Personal Jurisdiction Standard

A court may only exercise personal jurisdiction over a non-resident defendant when that exercise comports both with the applicable state long-arm statute and with constitutional principles of due process. *Dow Chem. Co. v. Calderon*, 422 F.3d 827, 830 (9th Cir. 2005). California’s long-arm statute authorizes courts to “exercise jurisdiction on any basis not

⁷ A true and correct copy of Instagram's U.S. TOU are attached to the accompanying Declaration of Fred Norton as **Exhibit A**.

⁸ See <https://www.consumerprotection.govt.nz/general-help/consumer-laws/consumer-guarantees-act/#who-is-covered-by-the-cga> (Accessed June 5, 2019).

1 inconsistent with the Constitution of . . . the United States.” Cal. Code Civ. P. § 410.10 (2018).
 2 Thus, the governing standard in California is whether exercise of personal jurisdiction comports
 3 with federal due process, which, in turn, requires that the defendant “have certain minimum
 4 contacts” with the forum state “such that the maintenance of the suit does not offend ‘traditional
 5 notions of fair play and substantial justice.’” *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316
 6 (1945).

7 **B. Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction**

8 Rule 12(b)(2) provides that a court may dismiss a claim for lack of personal jurisdiction.
 9 Fed. R. Civ. P. 12(b)(2). Courts are given “considerable procedural leeway” in deciding a
 10 pretrial motion to dismiss for lack of personal jurisdiction, and they may do so on the basis of
 11 affidavits alone, permit discovery in aid of the motion, or conduct an evidentiary hearing on the
 12 merits. *Dorchester Fin'l Secur., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 84 (2nd Cir. 2013);
 13 *Ridgway v. Phillips*, 2019 WL 1746063, at *2 (N.D. Cal. Apr. 18, 2019).

14 When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears
 15 the burden of demonstrating that the court has jurisdiction over the defendant. *Pebble Beach Co.*
 16 *v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006); *Schwarzenegger v. Fred Martin Motor Co.*, 374
 17 F.3d 797, 800 (9th Cir. 2004). To make a *prima facie* showing of personal jurisdiction, a
 18 plaintiff must produce “facts that if true would support jurisdiction over the defendant.” *High*
 19 *Tech Pet Prods., Inc. v. Juxin Pet Prods. Co., Ltd.*, 2013 WL 1281619, at *4 (E.D. Cal. Mar. 27,
 20 2013) (quoting *Harris Rutsky & Co. Inc. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122,
 21 1129 (9th Cir. 2003)).

22 A *prima facie* showing of personal jurisdiction requires “well pled facts,” as
 23 distinguished from “mere conclusory allegations.” *Id.* (quoting *Wenz v. Memery Crystal*, 55 F.3d
 24 1503, 1505 (10th Cir. 1995)). In other words, “a plaintiff must allege specific acts connecting
 25 defendant with the forum to support a finding of jurisdiction.” *Greenspun v. Del E. Webb Corp.*,
 26 634 F.2d 1204, 1208, n.5 (9th Cir. 1980). But the court “may not assume the truth of allegations
 27 in a pleading which are contradicted by affidavit.” *Data Disc, Inc. v. Sys. Tech. Associates, Inc.*,
 28 557 F.2d 1280, 1284 (9th Cir. 1977).

1 There are two types of personal jurisdiction: general and specific. *Schwarzenegger*, 374
 2 F.3d at 801-802. For general personal jurisdiction to exist over a nonresident defendant, the
 3 defendant must engage in “continuous and systematic general business contacts that approximate
 4 physical presence in the forum state.” *Id.* at 801 (quotations and citations omitted).

5 If a foreign defendant’s activities within the state are not so pervasive as to justify the
 6 exercise of general jurisdiction, the Court may exercise “limited” or “specific” personal
 7 jurisdiction, but only if each part of the following three-prong test is satisfied:

8 (1) The non-resident defendant must purposefully direct his activities or
 9 consummate some transaction with the forum or resident thereof; or perform some
 10 act by which he purposefully avails himself of the privilege of conducting activities
 11 in the forum, thereby invoking the benefits and protections of its laws; (2) the claim
 12 must be one which arises out of or relates to the defendant’s forum-related activities;
 13 and (3) the exercise of jurisdiction must comport with fair play and substantial
 14 justice, i.e. it must be reasonable.

15 *Id.* at 802; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-478 (1985) (“minimum
 16 requirements inherent in the concept of ‘fair play and substantial justice’ may defeat the
 17 reasonableness of jurisdiction even if the defendant has purposefully engaged in forum
 18 activities”). The plaintiff bears the burden of satisfying the first two prongs of the specific
 19 jurisdiction test; if the plaintiff fails to satisfy either of these prongs, personal jurisdiction is
 20 defeated. *Id.* at 802.

21 The unique burdens on foreign defendants, which arise from having to defend themselves
 22 across national borders, are entitled to “significant weight” in assessing reasonableness under the
 23 third prong of the specific jurisdiction test. *Asahi Metal Industry Co., Ltd. v. Superior Court*,
 24 480 U.S. 102, 114 (1987); *see also Rano v. Sipa Press, Inc.*, 987 F2d 580, 588 (9th Cir. 1993)
 25 (recognizing that “litigation against an alien defendant requires a higher jurisdictional barrier
 26 than litigation against a citizen from a sister state”).

27 **C. Forum Non Conveniens**

28 The common law doctrine of *forum non conveniens* allows a court having jurisdiction
 29 over the subject matter and parties to decline to exercise its jurisdiction where litigation in the
 30 forum would be seriously inconvenient for one of the parties and a more convenient forum is
 31 available elsewhere: “At bottom, the doctrine of [*forum non conveniens*] is nothing more or less

1 than a supervening venue provision, permitting displacement of the ordinary rules of venue
 2 when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined.”
 3 *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994). A party moving to dismiss based
 4 on *forum non conveniens* must show: (1) there is an adequate alternative forum; and (2) the
 5 balance of private and public interest factors favors dismissal. *Sinochem Int'l Co. Ltd. v.*
 6 *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007).

7 In determining whether an alternative forum is “available,” it ordinarily is irrelevant that
 8 the foreign court may apply substantive law less favorable to the plaintiff unless “the remedy
 9 provided … is so clearly inadequate or unsatisfactory that it is no remedy at all.” *Piper Aircraft*
 10 *Co. v. Reyno*, 454 U.S. 235, 254 (1981). An alternate forum is not inadequate simply because it
 11 provides a different range of remedies for the same misconduct. *Lockman Found. v. Evangelical*
 12 *Alliance Mission*, 930 F2d 764, 768 (9th Cir. 1991) (Japan is an adequate alternate forum to
 13 litigate dispute even if certain claims are not available to plaintiff in Japan).

14 **IV. DEFENDANTS ARE NOT SUBJECT TO PERSONAL JURISDICTION IN**
CALIFORNIA

15 Plaintiffs do not satisfy their burden of proving that minimum contacts exist between
 16 Defendants, on the one hand, and California, on the other hand, so as to justify an exercise of
 17 personal jurisdiction over Defendants. *Pebble Beach Co.*, 453 F.3d at 1154; *Harris Rutsky &*
 18 *Co.*, 328 F.3d at 1128-29.

19 **A. Defendants Did Not Consent to Personal Jurisdiction in California**

20 Plaintiffs allege that Defendants submitted to personal jurisdiction in California when
 21 they “personally used Instagram [and] their business used thousands of Instagram accounts.”
 22 Compl. ¶ 13. Though the Complaint contains no specific allegations as to the identity of those
 23 alleged accounts, when they were created, or how they were used, Plaintiffs generically allege
 24 that anyone who uses an Instagram account must agree to the Instagram TOU, including its
 25 jurisdiction clause. *Id.* On that basis, Plaintiffs contend that the Defendants must have
 26 consented to jurisdiction in California. *Id.* Plaintiffs’ allegations are wrong, and rest on a
 27 fundamental mischaracterization of Defendants’ business. In fact, Defendants never used
 28

1 Instagram in the manner Plaintiffs suggest and never submitted to personal jurisdiction in
 2 California via the TOU or any other means.

3 But even if Defendants agreed to Instagram's TOU (they did not), the jurisdiction clause
 4 in that agreement in fact requires Instagram to litigate this matter in New Zealand. At the very
 5 least, Instagram's TOU jurisdiction clause is ambiguous as to the Individually Named
 6 Defendants, and that ambiguity should be both (1) interpreted against Instagram by this Court
 7 and (2) ultimately resolved in New Zealand.

8 **1. The Individually Named Defendants Did Not Consent to Jurisdiction**
 9 **in California**

10 As to Defendants' alleged "personal[]" use of Instagram (Compl. ¶ 13), of the
 11 Individually Named Defendants only Mr. Nollen has ever maintained a personal Instagram
 12 account. Nollen Decl. ¶ 7. Thus, as an initial matter, Messrs. Hedges and Pasanen did not
 13 "personally use[]" Instagram, as Plaintiffs suggest, did not consent to the Instagram TOU, and
 14 cannot be bound by its terms. It is axiomatic, even in the context of internet click-wrap
 15 agreements, that a party cannot be bound to the terms of a contract to which it never agreed. *See*
 16 *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) ("[w]hile new commerce
 17 on the Internet has exposed courts to many new situations, it has not fundamentally changed the
 18 principles of contract ... [o]ne such principle is the requirement that mutual manifestation of
 19 assent, whether by written or spoken word or by conduct, is the touchstone of contract.")
 20 (internal citations and quotations omitted). "[T]he Court cannot exercise personal jurisdiction
 21 over a nonresident Defendant based on a provision in a contract to which Defendant is not a
 22 party." *Wu v. BDK DSD*, 2016 WL 1059534, at *2 (D. Ariz. Mar. 17, 2016).

23 Regarding Mr. Nollen, his (now closed) Instagram account was strictly for personal use
 24 (e.g., posting personal photographs for family and friends) and had ***absolutely nothing to do*** with
 25 the commercial misconduct alleged in the Complaint. Nollen Decl. ¶ 7. Mr. Nollen's personal,
 26 non-commercial Instagram account cannot, in the interest of fair play and substantial justice,
 27 subject him to personal jurisdiction in California to litigate claims that are entirely unrelated to
 28 that personal account. *See Rey v. Rey*, 666 F. App'x 675, 676 (9th Cir. 2016) (written

1 agreement's forum selection clause, which encompassed only disputes "stemming from," or
 2 "arising under," a written agreement, does not apply to dispute between parties that is unrelated
 3 to the agreement); *Bay State Anesthesia, Inc. v. Mallinckrodt, Inc.*, 2002 WL 31761286 (D.
 4 Mass. Dec. 6, 2002) (forum selection clause specifying Missouri courts as exclusive forum for
 5 any "dispute related to or arising out of" parties' agreement did not apply to suit alleging conduct
 6 that was unrelated to the contract's terms and that occurred after the contract was terminated).

7 In this case, as in *Rey* and *Bay State Anesthesia*, Instagram's forum selection clause
 8 relates to disputes "that arise[] out of or relate[] to **these Terms**." Dewar Decl., Exh. A (emph.
 9 added). The purported dispute between Instagram and Mr. Nollen, as described in the
 10 Complaint, relates to alleged commercial misconduct by LikeSocial.co. Thus, the dispute is
 11 unrelated to the TOU agreement memorializing Mr. Nollen's personal Instagram account, and
 12 the forum selection clause related to that personal account cannot form the basis of personal
 13 jurisdiction for this dispute. *See Rey*, 666 F. App'x at 676.

14 Further, even if Mr. Nollen's personal Instagram account subjected him to Instagram's
 15 TOU for this commercial dispute (it does not), the Terms *explicitly require* Instagram to litigate
 16 any dispute it has with Mr. Nollen – a "consumer" – in New Zealand.⁹ Indeed, Instagram must
 17 litigate its dispute with each of the Individually Named Defendants in New Zealand, as each is a
 18 "consumer."

19 Instagram may present a differing interpretation of the TOU, or disagree that the Terms
 20 require Instagram to litigate against the Individually Named Defendants in New Zealand. To the
 21 extent that Instagram presents a different interpretation of the jurisdiction clause in its click-
 22 wrap, adhesion contract, thereby indicating contractual ambiguity, that ambiguity should be
 23 interpreted against Instagram (the drafter) and resolved in New Zealand under the doctrine of

24
 25
 26 ⁹ See TOU at 5 ("If you are a consumer, the laws of the country in which you reside will apply to
 27 any claim, cause of action, or dispute you have against us that arises out of or relates to these
 Terms ("claim"), and you may resolve your claim in any competent court in that country that has
 jurisdiction over the claim.").

28 (Footnote Continued on Next Page.)

1 *contra proferentem*.¹⁰

2 Because the Individually Named Defendants never agreed to the Instagram TOU, they
 3 cannot reasonably be haled to California to defend themselves against Instagram's lawsuit.
 4 Exercising personal jurisdiction over the Individuals would offend due process and would be
 5 inconsistent with traditional notions of fair play and substantial justice.

6 **2. Defendants Did Not Use "Thousands" of Instagram Accounts in**
Connection with Their Business

7 As to the purported "thousands" of business Instagram accounts (Compl. ¶ 13), Plaintiffs
 8 are similarly misinformed. When referencing "thousands" of accounts, Plaintiffs are ostensibly
 9 referring to the "network of computers or 'bots'" that Plaintiffs allege SMS used to "deliver
 10 automated likes to [] customers' Instagram accounts." Compl. ¶ 1. However, *at no time* did
 11 SMS or LikeSocial.co use computers or bots to manipulate or otherwise access Instagram users'
 12 accounts; all "likes" and "followers" delivered to user accounts in connection with the
 13 LikeSocial.co business were delivered *exclusively* by third-party vendors – vendors that are not
 14 parties to this lawsuit.¹¹ Pasanen Decl. ¶ 21. Neither SMS nor LikeSocial.co had "thousands" of
 15 Instagram accounts, nor did they own or use a "network of computers or 'bots.'" Pasanen Decl.
 16 ¶ 24. In fact, SMS and LikeSocial.co never maintained a single Instagram account. *Id.* ¶¶ 22,
 17 25. Of the entities mentioned in the Complaint, only the (now defunct) SocialEnvy.co, operated
 18 by non-party SEL, maintained an Instagram account – one, not thousands – and that account
 19 never accessed or manipulated Instagram user accounts in any way. *See* Sect. II, *supra*; Hedges
 20 Decl. ¶¶ 21-23. Because SMS never used or accessed Instagram, it did not agree to the
 21 Instagram TOU and never submitted to jurisdiction in California.

22 In sum, the forum selection clause contained in Instagram's TOU cannot form the basis

25 ¹⁰ *See Mastrobuono v. Sherson Lehman*, 514 U.S. 52, 62 (1995) ("There is a well-established
 26 common-law rule of contract interpretation that a court should construe ambiguous language
 27 against the interest of the party that drafted it."); *World Sav. & Loan Ass'n. v. Fed. Home Loan
 Bank of San Francisco*, 2002 WL 1941155, at *6 (N.D. Cal. Aug. 19, 2002) (quoting
Mastrobuono and affirming the doctrine of *contra proferentem*).

28 ¹¹ Indeed, Defendants have never directly accessed or manipulated Instagram users' accounts in
 connection with any business or service germane to this Complaint. *See* Sect. II, *supra*.

1 of personal jurisdiction over the Defendants. Three of the four defendants never consented to
 2 Instagram's TOU, and the fourth's consent was entirely unrelated to the alleged facts giving rise
 3 to this dispute and cannot form the basis of personal jurisdiction here.

4 **Defendants Do Not Have the Necessary “Continuous and Systematic**
Contacts” With California to Confer General Jurisdiction

5 If a foreign defendant engages in “continuous and systematic general business contacts”
 6 that “approximate physical presence” in the forum state, a court may exercise general personal
 7 jurisdiction. *Schwarzenegger*, 374 F.3d at 801. “This is an exacting standard, as it should be,
 8 because a finding of general jurisdiction permits a defendant to be haled into court in the forum
 9 state to answer for any of its activities anywhere in the world.” *Id.*; *see also Tuazon v. R. J.*
 10 *Reynolds Tobacco Co.*, 433 F.3d 1163, 1169 (9th Cir. 2006) (“The standard for general
 11 jurisdiction is high; contacts with a state must approximate physical presence”) (internal
 12 quotations omitted).

13 In this case, Defendants had no business contact with California, much less continuous
 14 and systematic contacts that would approximate physical presence in the state.¹² The
 15 Individually Named Defendants are New Zealand residents with no connection to California.
 16 *See Sect. II, supra.* Similarly, SMS is a New Zealand company with no presence in, or business
 17 ties to, California. *Id.*

18 Plaintiffs may argue that general jurisdiction is established here because Defendants’
 19 business *relates to* Instagram, a company headquartered in California. This argument cannot
 20 satisfy the “exacting” general jurisdiction standard, which requires that a defendant engage in
 21 “continuous and systematic general business contacts that approximate physical presence in the
 22 forum state.” *Schwarzenegger*, 374 F.3d at 801. While SMS’s LikeSocial.co business did *relate*
 23 to Instagram (in that it offers a service to Instagram users), Plaintiffs cannot credibly allege that

25
 26 ¹² Indeed, the only entity with any connection to Defendants that has any business interests or
 27 connections in the United States at all is non-party SEL, which has occasionally contracted with
 28 a U.S.-based vendor to conduct email campaigns concerning SEL’s business, not Defendants’.
 Hedges Decl. ¶ 18. As the principles discussed herein make clear, that sporadic, limited
 engagement with a third-party in the United States would be insufficient to support jurisdiction
 even against SEL, much less any of the actual Defendants.

1 LikeSocial.co had continuous and systematic general business contacts in California that
 2 approximate physical presence in the state. *Id.*

3 Under these circumstances, it would not comport with due process and substantial justice
 4 to require the Defendants, who have no contact whatsoever with California, to defend a lawsuit
 5 halfway around the world.

6 **C. Plaintiffs Cannot Establish that Specific Jurisdiction over Defendants Is**
Proper

7 Specific jurisdiction cannot be established in this case, where: (1) Plaintiffs cannot
 8 demonstrate that Defendants purposefully directed their activities at California or purposefully
 9 availed themselves of the privilege of doing business in California; and (2) Plaintiffs' claims do
 10 not arise out of any California-related conduct by Defendants. *Schwarzenegger*, 374 F.3d at 802.
 11 Further, given that Defendants have no contacts with California, the exercise of jurisdiction over
 12 Defendants would be unreasonable. *Id.*; *see also Burger King Corp.*, 471 U.S. at 476-78
 13 (“minimum requirements inherent in the concept of ‘fair play and substantial justice’ may defeat
 14 the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum
 15 activities”).

16 **1. Defendants Have Not Purposefully Availed Themselves of the**
Privilege to Do Business in California, Nor Purposefully Directed
Their Activities Toward California

19 Defendants have not purposefully availed themselves of the privilege of doing business in
 20 California, nor purposefully directed their activities toward California.

21 First, purposeful availment is “most often used in suits sounding in contract” and
 22 “typically consists of evidence of the defendant’s actions in the forum, such as executing or
 23 performing a contract there[,]” which demonstrates that the defendant “purposefully avail[ed]
 24 itself of the privilege of conducting activities within the forum State, thus invoking the benefits
 25 and protections of its laws.” *Schwarzenegger*, 374 F.3d at 802 (citations omitted).

26 Here, Defendants did not purposefully avail themselves of the privilege of conducting
 27 business in California because Defendants have taken no actions in California at all. Plaintiffs
 28 may argue that Defendants executed a contract (the TOU) with a California company. However,

1 as discussed above, Defendants did not enter into any agreement with Instagram. *See* Sect. IV.A,
 2 *supra*. Even if Defendants *did* agree to terms with Instagram, they were New Zealand terms,
 3 agreed to by New Zealand entities operating exclusively in New Zealand, and related to a
 4 globally-available social media platform. *See* Sect. II, *supra*. California does not factor in.

5 Second, a showing of purposeful direction “usually consists of evidence of the
 6 defendant’s actions outside the forum state that are directed at the forum, such as the distribution
 7 in the forum state of goods originating elsewhere.” *Schwarzenegger*, 374 F.3d at 803. Courts
 8 evaluate purposeful direction under the three-part “effects” test traceable to the Supreme Court’s
 9 decision in *Calder v. Jones*.¹³ *Id.* The *Calder* test “requires that the defendant allegedly have (1)
 10 committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the
 11 defendant knows is likely to be suffered in the forum state.” *Id.* (*citing Dole Food Co., Inc. v.*
 12 *Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)).¹⁴

13 The *Calder* test is not satisfied here. Neither the Individually Named Defendants, nor
 14 SMS, have committed any intentional act that was expressly aimed at California or that caused
 15 harm in California. Plaintiffs will argue that they allege SMS’s business, including
 16 LikeSocial.co, has damaged Instagram, a social networking platform with 1 billion users, and
 17 Facebook, one of the largest public companies in the world. Defendants deny those assertions,
 18 but that is beside the point: no credible reading of the alleged facts suggests Defendants
 19 committed an intentional act expressly aimed at California.

20 Plaintiffs have not satisfied the first prong of the specific jurisdiction test.

21 **2. Plaintiffs’ Claims Do Not Arise Out Of, or Result From, Any Alleged**
Forum-Related Activities by Defendants

22 Neither do Plaintiffs satisfy the second prong of the specific jurisdiction test, which

25 ¹³ *Calder v. Jones*, 465 U.S. 783 (1984).

26 ¹⁴ The Ninth Circuit has noted that referring to *Calder* as an “effects” test can be misleading. *See*
 27 *Pebble Beach Co.*, 453 F.3d at 1156. For that reason, the Ninth Circuit cautioned courts to not
 focus too narrowly on the *Calder* test’s third prong – the so-called “effects prong” – noting that
 “something more is needed in addition to a mere foreseeable effect.” *Id.* (internal quotations
 omitted). In other words, the defendant’s alleged conduct must be “expressly aimed” at the
 forum state. *Id.*

1 requires Plaintiffs to demonstrate that their claims arise out of or relate to Defendants' forum-
 2 related activities. *Schwarzenegger*, 374 F.3d at 802.

3 Plaintiffs assert claims for: breach of contract (for Defendants' alleged violation of
 4 Instagram's TOU); computer hacking under California Penal Code § 502 and the federal
 5 Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (for allegedly accessing and using Instagram
 6 and Facebook's computers without authorization, resulting in damage to Facebook and
 7 Instagram); and unjust enrichment at Plaintiffs' expense.

8 Plaintiffs do not – and indeed cannot – demonstrate that these claims arise out of
 9 Defendants' California-related activities, because Defendants **have no California-related**
 10 **activities**. *See* Sect. II, *supra*. As discussed above, Defendants live, and their business operates,
 11 exclusively in New Zealand. They have no business or personal contacts with California, much
 12 less contacts that give rise to Plaintiffs' claims. Plaintiffs allege that Defendants breached
 13 Instagram's TOU, but they cannot credibly allege that the purported breach had anything to do
 14 with California-related activity by Defendants. Plaintiffs allege that Defendants accessed their
 15 computer networks without authorization, but Defendants never accessed the Instagram
 16 computer network in any way that relates to the allegations in the Complaint (or at all). The
 17 misconduct alleged in the Complaint (e.g., using “bots” to manipulate individual Instagram
 18 accounts) was not conduct by Defendants in any event, but if true, was conduct exclusively by
 19 third-party vendors outside of the U.S. Finally, any alleged unjust enrichment on the part of
 20 Defendants relates exclusively to their activities in New Zealand, and in no way relates to actions
 21 taken by Defendants in California (of which there are none). Plaintiffs have not satisfied the
 22 second prong of the limited jurisdiction test.

23 **3. Exercising Jurisdiction Over Defendants Would Be Unreasonable**

24 Finally, it would be unreasonable to subject Defendants to jurisdiction in California. The
 25 unique burdens on foreign defendants, which arise from having to defend themselves across
 26 national borders, are entitled to “significant weight” in assessing reasonableness. *Asahi Metal*
 27 *Industry Co.*, 480 U.S. at 114; *Rano*, 987 F.2d at 588 (recognizing that “litigation against an alien

28 defendant requires a higher jurisdictional barrier than litigation against a citizen from a sister

1 state”).

2 In *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1487-88 (9th Cir. 1993), the
 3 Ninth Circuit identified seven factors that a court should consider when determining whether the
 4 exercise of jurisdiction over a defendant comports with “fair play and substantial justice.” None
 5 of the seven factors are dispositive in themselves, but instead, a court should balance all seven
 6 factors. *Id.* These factors are:

7 (1) The extent of the defendants’ purposeful interjection into the forum state’s
 8 affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of
 9 conflict with the sovereignty of the defendants’ state; (4) the forum state’s interest
 10 in adjudicating the dispute; (5) the most efficient judicial resolution of the
 11 controversy; (6) the importance of the forum to the plaintiff’s interest in convenient
 12 and effective relief; and (7) the existence of an alternative forum.

Id.

11 (1) **Purposeful Interjection**

12 “[T]he smaller the element of purposeful interjection, the less is jurisdiction to be
 13 anticipated and the less reasonable is its exercise.” *Core-Vent*, 11 F.3d at 1488 (citation
 14 omitted). As discussed above, Defendants have not purposefully interjected themselves into
 15 California’s affairs. The Individually Named Defendants and SMS have nothing at all to do with
 16 California.

17 (2) **Burden on Defendants**

18 “The law of personal jurisdiction is asymmetrical and is primarily concerned with the
 19 defendant’s burden.” *Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 561 (9th Cir. 1995). In cases
 20 with overseas defendants, “[t]he unique burdens placed upon one who must defend oneself in a
 21 foreign legal system should have significant weight in assessing the reasonableness of stretching
 22 the long arm of personal jurisdiction over national borders.” *Asahi*, 480 U.S. at 114.

23 Defending this case in California would be a tremendous burden on Defendants. The
 24 Individuals and SMS are all located in New Zealand. Forcing Defendants to make the 12+ hour
 25 trip from New Zealand to San Francisco to participate in this litigation would place a ruinous
 26 financial and emotional burden on Defendants, and the nineteen-hour time difference between
 27 California and New Zealand would interfere with the ability of the Defendants to communicate

1 effectively with California counsel. *See Core-Vent*, 11 F.3d at 1494 (burdensome travel
 2 requirements weigh against finding personal jurisdiction). The burden is especially unfair given
 3 that Facebook maintains an office in New Zealand and could easily litigate this matter in
 4 Defendants' home country.

5 **(3) Conflict with Sovereignty**

6 The third factor, conflict with the sovereignty of a defendant's state, requires an
 7 examination of the competing sovereign interests in adjudicating the dispute. *Dole Food*, 303
 8 F.3d at 1115. "Great care and reserve should be exercised when extending our notions of
 9 personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115 (quoting *United States*
 10 *v. First National City Bank*, 379 U.S. 378, 404 (1965)). The United States' relations with other
 11 nations are "best served by a careful inquiry into the reasonableness of the [] assertion of
 12 jurisdiction, and an unwillingness to find an alien defendant's serious burdens outweighed where
 13 [] the interests of the plaintiff and the forum State are minimal." *Id.* Litigation against an alien
 14 defendant creates "a higher jurisdictional barrier than litigation against a citizen from a sister
 15 state because important sovereignty concerns exist." *Core-Vent*, 11 F.3d at 1489.

16 Sovereignty concerns weigh more heavily when the defendants have no United States-
 17 based relationships. *Core-Vent*, 11 F.3d at 1489 (because foreign defendants had no U.S.-based
 18 relationships, the sovereignty factor weighed heavily in the foreign defendants' favor"); *see also*
 19 *Asahi*, 480 U.S. at 112–13 (absence of agent or subsidiary in the United States enhanced
 20 sovereignty concerns); *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1444 (9th Cir.1987)
 21 (absence of officer, affiliate or subsidiary in United States significant in evaluating sovereignty
 22 concerns).

23 In this case, the Individually Named Defendants are citizens of New Zealand and SMS is
 24 a corporation organized under the laws of, and headquartered in, New Zealand. *See* Sect. II,
 25 *supra*. New Zealand has an interest in assuring that disputes involving its citizens and domestic
 26 corporations – especially those with no relationship to the foreign jurisdiction to which they've

1 been haled – are fairly adjudicated in courts convenient to its citizens.¹⁵ For this Court to assume
 2 jurisdiction would impinge New Zealand’s sovereignty.

3 **(4) Forum State’s Interest**

4 In contrast, California has little or no interest in adjudicating this dispute. While
 5 Plaintiffs have their headquarters in California, the claim itself arises from alleged conduct that
 6 took place in New Zealand by New Zealanders. The LikeSocial.co website, over which
 7 Plaintiffs have sued, is produced and emanates from New Zealand. The Individually Named
 8 Defendants live, and SMS is headquartered and operates, in New Zealand. To the extent that
 9 SMS’s third-party vendors are relevant to Plaintiffs’ claims, those third-party vendors are located
 10 outside of the U.S.

11 **(5) Efficient Resolution of the Controversy**

12 In evaluating this factor, courts look primarily to “where the witnesses and the evidence
 13 are likely to be located.” *Core-Vent*, 11 F.3d at 1489. The witnesses and the evidence in this
 14 case are in New Zealand. The most efficient venue to resolve this case is New Zealand,
 15 especially so since Facebook is also located in New Zealand.

16 **(6) Plaintiffs’ Interest in Convenient and Effective Relief**

17 Litigating this matter in New Zealand will not diminish Plaintiffs’ ability to seek
 18 convenient and effective relief. The pertinent witnesses and evidence are in New Zealand, and
 19 Facebook has a physical presence in New Zealand. Nothing suggests that pursuing relief in New
 20 Zealand would be any less convenient or effective for Plaintiffs than litigating in California.

21 Regardless, inconvenience to the plaintiff is an “insignificant” factor in the
 22 reasonableness analysis; according to the Ninth Circuit in *Core-Vent*: “neither the Supreme

23
 24 ¹⁵ Further, New Zealand has a particular interest in adjudicating this dispute, which raises legal
 25 issues that are unresolved in that country. Specifically, New Zealand courts have not yet
 26 decided, in the first instance: (1) whether a click-wrap agreement such as Instagram’s TOU
 27 creates enforceable obligations; (2) whether an adhesion click-wrap agreement, even if otherwise
 28 enforceable, can include a consent to jurisdiction in a foreign forum; (3) whether the one-sided
 nature of Instagram’s TOU, and specifically its dispute resolution procedures, makes it
 unconscionable; (4) whether the severability clause would be enforced if the overall agreement
 were unconscionable; and (5) whether Instagram can use Mr. Nollen’s personal Instagram
 account to justify imposing jurisdiction in an unrelated commercial dispute with an entity he
 arguably controls. Dewar Decl. ¶ 5.

1 Court nor our court has given much weight to inconvenience to the plaintiff ... no doctorate in
 2 astrophysics is required to deduce that trying a case where one lives is almost always a plaintiff's
 3 preference ... [but a] mere preference on the part of the plaintiff for its home forum does not
 4 affect the balancing." *Core-Vent Corp.*, 11 F.3d at 1490.

5 **(7) Existence of an Alternative Forum**

6 Plaintiffs bear the burden of proving that an alternative forum is unavailable, and their
 7 preference is not the test. *Core-Vent*, 11 F.3d at 1490. As discussed more fully in Section V
 8 below, New Zealand is an adequate – and indeed, better – forum to litigate this case. The parties,
 9 witnesses, and evidence are in New Zealand and threshold jurisdictional questions turn on the
 10 court's interpretation of New Zealand's consumer protection framework.

11 In sum, the *Core-Vent* factors suggest that exercising jurisdiction over Defendants in this
 12 case would be unreasonable. Given that, and also given that Defendants have not purposefully
 13 availed themselves of California nor directed any actions toward California resulting in harm to
 14 Plaintiffs, the Court should decline to exercise specific jurisdiction in this case.

15 **D. Even If Social Media Series Limited Were Subject to Personal Jurisdiction in**
This Court, the Individually Named Defendants Are Not Subject to Personal
Jurisdiction in California

17 Even if SMS were subject to personal jurisdiction (and for the reasons stated above, it is
 18 not), SMS's directors – the Individually Named Defendants – are not automatically subject to
 19 personal jurisdiction in California. The mere fact that a corporation is subject to local
 20 jurisdiction does not mean its nonresident officers, directors, agents, and employees are suable
 21 locally as well. *Calder*, 465 U.S. at 790 (1984) (a defendant's contacts with forum state are not
 22 to be judged according to her employer's activities there); *Davis v. Metro Productions, Inc.*, 885
 23 F2d 515, 521 (9th Cir. 1989) (same); *Smith v. Antler Insanity, LLC*, 58 F.Supp.3d 716, 722 (S.D.
 24 Miss. 2014) (members of limited liability company not subject to personal jurisdiction in forum
 25 state simply because LLC subject to jurisdiction there).

26 Here, even if the Court determines that personal jurisdiction over SMS is proper, it may
 27 not automatically make the same determination regarding SMS's directors. The misconduct
 28

1 alleged in the Complaint relates exclusively to SMS and its operation of LikeSocial.co and
 2 related websites. Given that, the Individually Named Defendants' only plausible relationship to
 3 the alleged misconduct in the Complaint – and their only conceivable contact with California – is
 4 through their positions as shareholders and directors of SMS. But a nonresident individual is not
 5 subject to personal jurisdiction based solely upon acts in the forum state undertaken in his or her
 6 corporate capacity. *See Calder*, 465 U.S. at 790.

7 **V. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BASED ON THE**
DOCTRINE OF *FORUM NON CONVENIENS*

8 In the event this Court finds personal jurisdiction over Defendants, it should still dismiss
 9 this action based on the common law doctrine of *forum non conveniens*. This doctrine applies
 10 when a defendant is a foreign entity, and allows a court, having jurisdiction over the subject
 11 matter and parties, to decline to exercise that jurisdiction where litigation in the forum would be
 12 seriously inconvenient for one of the parties and a more convenient forum is available elsewhere.
 13 *American Dredging Co.*, 510 U.S. at 448. A party moving to dismiss on grounds of *forum non*
 14 *conveniens* must show that there is an adequate alternative forum and that the balance of private
 15 and public interest factors favors dismissal. *Sinochem Int'l Co. Ltd.*, 549 U.S. at 429; *Piper*
 16 *Aircraft*, 454 U.S. at 238. Both elements are satisfied in this case.

17 **A. New Zealand Is an Adequate Alternative Forum**

18 The first requirement is that an alternative forum be available in the foreign country.
 19 This requires that the defendant be amenable to service of process there. *See Piper*, 454 U.S. at
 20 254. A defendant's agreement to submit to the personal jurisdiction of the foreign country
 21 satisfies this requirement. *Lockman Found.*, 930 F.2d at 768.

22 In determining whether an alternative forum is "available," it ordinarily is irrelevant that
 23 the foreign court may apply substantive law less favorable to the plaintiff, unless "the remedy
 24 provided ... is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper*, 454 U.S.
 25 at 254 (fact that Scotland does not recognize products liability claim did not constitute "no
 26 remedy" because negligence recovery possible); *see Ranza v. Nike, Inc.*, 793 F.3d 1059, 1078
 27 (9th Cir. 2015) (Netherlands an adequate forum since "some remedy" provided, although less
 28

1 generous than under U.S. law). A foreign forum will be deemed adequate unless it offers no
 2 practical remedy for the plaintiff's claimed wrong. *Piper*, 454 U.S. at 254 (There may be "rare
 3 circumstances" in which the "remedy provided by the alternative forum is so clearly inadequate
 4 or unsatisfactory that it is no remedy at all"); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1144
 5 (9th Cir. 2001) (district court did not abuse its discretion in finding that an adequate remedy is
 6 available in New Zealand).

7 In this case, New Zealand undoubtedly offers an adequate alternate forum. Plaintiffs
 8 could seek the same remedies in New Zealand that they seek in California. Dewar Decl. ¶ 6.
 9 There is nothing to suggest that a New Zealand court would offer an inadequate, unsatisfactory,
 10 or meaningfully different remedy to Plaintiffs than the remedy they could obtain in California.

11 **B. Private and Public Interest Factors Favor Litigating This Matter in New**
 12 **Zealand**

13 **1. The Private Interest Factors Favor New Zealand**

14 Given the existence of an adequate alternative forum, a district court must consider the
 15 balance of private and public interest factors to determine whether to dismiss on grounds of
 16 *forum non conveniens*. *Lockman*, 930 F.2d at 769. "Private interest factors include: ease of
 17 access to sources of proof; compulsory process to obtain the attendance of hostile witnesses, and
 18 the cost of transporting friendly witnesses; and other problems that interfere with an expeditious
 19 trial." *Id.* (internal quotations omitted). Where a majority of witnesses and documents are
 20 located in an alternate forum, the action should be litigated there. *Creative Tech., Ltd. v. Aztech*
 21 *Sys. Pte., Ltd.*, 61 F.3d 696, 703 (9th Cir. 1995) (dismissal upheld in copyright infringement suit
 22 where the primary parties, the key infringing conduct, and the bulk of the witnesses are located
 23 in a foreign jurisdiction). As discussed above in relation to Defendants' 12(b)(2) Motion, all
 24 witnesses, documents, and Defendants are located in New Zealand. Plaintiff Facebook is also
 25 located in New Zealand. The private interest factors strongly favor New Zealand.

26 **2. The Public Interest Factors Favor New Zealand**

27 Public interest factors include: (1) administrative difficulties flowing from court
 28 congestion; (2) imposition of jury duty on the people of a community that has no relation to the

1 litigation; (3) local interest in having localized controversies decided at home; (4) the interest in
 2 having a diversity case tried in a forum familiar with the law that governs the action; (5) the
 3 avoidance of unnecessary problems in conflicts of law. *Creative Tech.*, 61 F.3d at 703-04.
 4 These factors also weigh in favor of dismissal. This dispute is not localized to the Northern
 5 District of California, such that litigating in San Francisco would serve the local interest. Given
 6 that Plaintiffs could bring their claims in a New Zealand court, California is not individually
 7 situated as the forum that must resolve this dispute. Finally, given the nature of this case and
 8 court congestion in the Northern District of California, the Court should not hesitate to direct
 9 Plaintiffs to file suit in New Zealand.

10 **3. The Balance of Conveniences Favors Dismissal**

11 Plaintiffs may argue that their choice of forum should not be disturbed, because to do so
 12 would deprive California companies of litigating in their home state. While a plaintiff's choice
 13 of forum may often be respected, “[t]he deference due to plaintiff[]...is far from absolute.”
 14 *Lockman*, 930 F.2d at 767. As the Supreme Court noted, “[a] citizen's forum choice should not
 15 be given dispositive weight . . . [I]f the balance of conveniences suggests that trial in the chosen
 16 forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.”
 17 *Piper Aircraft*, 454 U.S. at 256, n.23. The balance of convenience in this case favors New
 18 Zealand. It would be a tremendous burden and an unfair result to require three New Zealand
 19 citizens and one New Zealand company to defend this claim in California against one of the
 20 largest companies in the world – a company that maintains a physical presence in Defendants'
 21 home country.

22 **VI. CONCLUSION**

23 For the foregoing reasons, Defendants respectfully request that their motion to dismiss be
 24 granted in its entirety.

25 Dated: June 12, 2019

THE NORTON LAW FIRM PC

26 By: /s/ Fred Norton
 27 Fred Norton
 28 Attorneys for Defendants